

ACQUISITION REFORM TRAINING MODULE
Implementing Changes to Contract Award & Follow Up

- Establishing & Using Task Orders
- Establishing & Using Task Orders Exercise
- Debriefing & Other Contracting Process Changes
- Debriefing & Other Contracting Process Changes Exercise
- **Changes in Protest, Dispute & Appeals Rules**
- Changes in Protest, Dispute & Appeals Rules Exercise

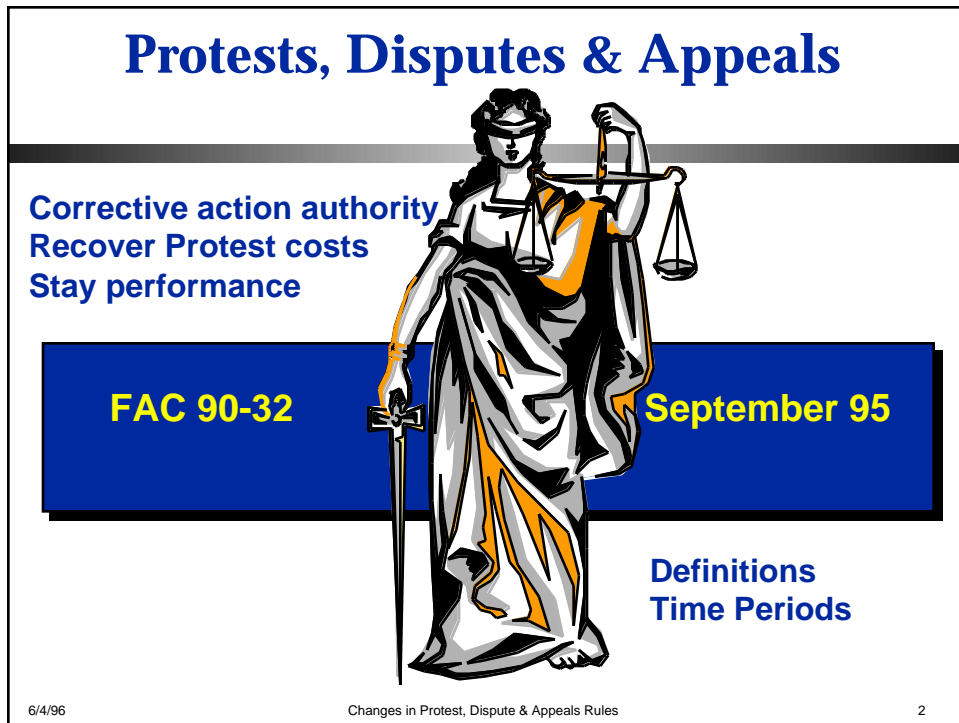
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Changes in Protest, Dispute & Appeals Rules

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Welcome to the final block in this module, Changes in Protests, Disputes and Appeals.

The new rule on protests, disputes and claims benefits you in several ways. It grants greater authority to agencies to pay protesters' costs when protests are sustained. The effect is to limit the protests which go to GAO, and therefore the administrative files you must prepare. Contracting officials must learn the skills to implement procedures and guidance for recovering protest costs in certain situations. Finally, you must have the skills to apply new definitions and timelines to complete actions effectively. The rule reflects the Acquisition Reform Guiding Principles of delegating authority and resolving issues at the lowest possible management level. The purpose of this lecture is to outline these changes and discuss their impact on the contracting process.



Protest and dispute procedures have long been a part of Government contract law. The General Accounting Office has been reviewing complaints by disappointed bidders alleging improper or inappropriate agency procurement actions since 1925. The authority to settle accounts was transferred from the Treasury Department when the Office of the Comptroller General and the GAO were created in 1921.

Although FASA breaks new procurement ground, the changes in the protest and dispute area are more incremental. The changes are largely technical and often merely conform the statute to existing practices. FASA clarifies definitions and converts time periods from "working days" to "calendar days." Agencies are granted greater authority to take corrective action and to recover protest costs in special situations. They are also directed to stay performance of contracts under other conditions.

The most important change in the dispute area involves a new statute of limitations on claims.

The lecture addresses the new definitions and highlights those process changes that are of greatest significance to you. The lecture is followed by a practical exercise which requires you to make decisions based on the new material.

The lecture includes a handout titled FAR Part 33 (The Small Stuff) covering numerous minor changes.

Definitions

» **“Day”...**

» **“Filed”....**

» **“Protest”...**

» **“Intervenor”.**

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We need to start with a few definitions...

(33.101) Day means “calendar” day unless otherwise specified. The time periods are about the same when you convert from “work” days to “calendar” days.

Filed refers to the complete receipt of any document by an agency before its close of business. Documents received after close of business are considered filed as of the next day. Unless otherwise stated, the agency close of business is presumed to be 4:30 PM, local time.

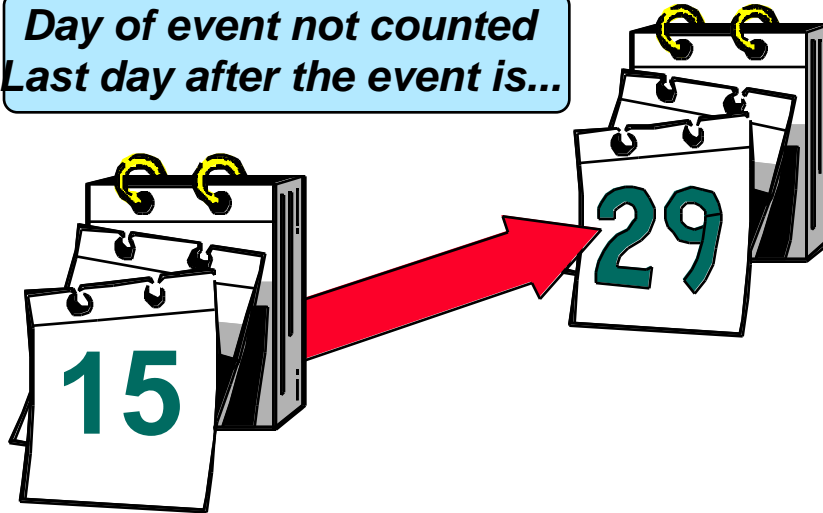
These two definitions are critical in determining whether a protest is timely or not, as well as in determining other time frames for actions by interested parties.

Protest means a written objection by an interested party to any of the following: (1) a solicitation (or other request) by an agency for offers for a contract for the procurement of property or services; (2) the cancellation of the solicitation or other request; (3) an award or proposed award of the contract; (4) a termination or cancellation, *if* the objection alleges that the termination or cancellation is based on improprieties concerning the award of the contract.

Intervenor means an awardee if the award has been made. If no award was made, intervenors are all offerors who appear to have a substantial prospect of receiving an award if the protest is denied.

Protests

*Day of event not counted
Last day after the event is...*



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The effects of the definition of day appear several places in the new rule so here is an example to help illustrate the definition. The day of the event is not included. So, if the event occurred on the 15th of the month, day 1 is the 16th. The last day after the event is included unless the last day is a Saturday, Sunday or a legal holiday. (In the case of filing a paper at any administrative forum, the last day is a day on which weather or other conditions causes the closing of the forum for all or part of the day, the next day on which the forum is open is included.) In our example, for a 14-day period from an event on the 15th, the 29th would be the last day unless one of the rules just stated applies.

In the case of the five day period after a debriefing date or the 10 day period after contract award for filing a protest resulting in a suspension of performance - Saturdays, Sundays and legal holidays shall be counted.

Agency Protests

Protest filing deadlines
changed 10 ➡ 14
Days

Agency provides
certified copy of the
ruling by certified mail
“Substantial” failure
to comply

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Agency protests. **(33.103(b))** Protesters now must file protests no later than 14 days after the basis of the protest is known or should be known, rather than the 10 work day period previously allowed the FAR. As a practical matter, these periods are about the same. A contracting officer, for good cause shown or where the protest raises significant issues, may continue to consider late protests.

In the past, when the protest would arrive at the GAO, the Government often did not know when the protester had received the contracting officer's decision in response to an agency protest, because the response had been sent by first class mail. As a result, the Government wouldn't know when the time period for filing the protest had expired. We need evidence of the date and time of receipt by the protester. The decision should be forwarded by certified mail, return receipt requested or by any other method that provides evidence of receipt (e.g., fax the agency response where the fax automatically generates the message received sheet. Or E-mail, where there is an electronic, save-to-disk message that the recipient has received the message.

(33.103(b)) Substantial failure to comply. Before FASA, protests were required to be concise and logically presented. Under the new rule, the protest must substantially fail one or the other of these tests. The contracting officer must not fail to address the merits of the protest for minor defects in form.



(33.102(a)) Contracting officers shall consider all protests and seek legal advice, whether protests are submitted before or after award and whether filed directly with the GAO or for certain ADP contracts, with the GSBGA. This is new guidance!

(33.103(b)) If a protest is upheld, the agency head can take any action available to the Comptroller General concerning upholding a bid protest and paying appropriate costs. This includes payment of the protester's costs, exclusive of profit, of filing and pursuing the protest, such as reasonable attorney, consultant and expert witness fees, and bid and proposal preparation costs.

There is no point in going through the GAO process if the only reason the protester has for resorting to the GAO forum is to obtain reimbursement for attorney fees. This also supports the guiding principle of empowerment and reducing cycle time.



Recovering protest costs **(33.102(b)(3))** The Government is authorized to recover protest costs from the awardee when the agency sustains a post-award protest because of the awardee's intentional or negligent misstatement, miscertification or misrepresentation. The Government may recover such costs by offsets against the contract. Also, consider referring the matter to the agency's debarment official.

Often as a result of discovery during a protest, the Government learns of intentional or negligent misstatements, misrepresentations, or miscertifications by the awardee that could not have been reasonably known to agency evaluators prior to award. A protest may be sustained where the award was based on a material misrepresentation by the awardee. Contracting activities have been without effective remedy in such cases. The agency could ask DOJ to file against the offeror making misrepresentations, but due to their heavy workload, this is not a practical alternative. The FAR change does not affect any substantive right of an offeror. If the remedy is to offset and the offeror believes offset is not justified, it may appeal to the agency or a BCA or the Court of Federal Claims.

Steps in Recovering Protest Costs



Recovering protest costs requires a determination by the contracting officer that there was at least negligence and it is in the best interests of the Government to collect the debt (and allows the apportioning of costs where the protest is sustained on several issues). There is also an HCA level review prior to issuing a final decision. The steps are:

1. Determine whether to demand reimbursement given such factors as amount of the debt, degree of the awardee's fault, and costs of collection.
2. Determine whether to recover costs by offset against the contract, another contract with the awardee, or by other available means.
3. If the decision is to demand reimbursement, the CO shall notify the contractor in writing of the nature and amount of the debt, and the intention to collect by offset if necessary.
4. Prior to issuing a final decision, the CO shall give the contractor an opportunity to inspect and copy related agency records to the extent permitted by statute and regulation, and request review of the matter by the Head of the Contracting Agency.



Stay performance. **(33.102(d)); (52.233.3)** The contracting officer may stay performance of a contract within 10 days after contract award or within five days after a debriefing date offered to the protester, whichever is later, if the contracting officer makes a written determination that:

- A protest is likely to be filed.
- interests of the United States.

At issue is the Government's liability if the contractor begins performance and then has to stop as the result of a protest. There is no liability if you stay the award.

If you believe the likely protester has good reason for a protest and that the protest will be sustained, consider immediate corrective action at the agency level, i.e., cancel and resolicit rather than award.

GAO Protests (Pre Award)

**GAO Regulations govern
Agency Administrative Report to
GAO extended 25 → 35 Days; 20
Days Express Option
Protest Files for Prospective Offerors**



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(33.104)

If any conflict arises between FAR and GAO's Bid Protest Rules, GAO's regulations govern (as published in 4 CFR 21).

Agencies used to have 25 work days to deliver the "agency administrative" report to GAO or 10 work days using the express option. The time frames are now 35 and 20 calendar days - roughly the same time except the express option is longer valid.

The contracting office must establish a protest file and provide reasonable access to actual or prospective offerors to disclosable information in the file.

Protest Files

- Index of documents
- Protest
- Protesting offer & offer protested
- Solicitation
- Relevant evaluation documents
- Abstract of offers
- Documents specifically requested by protester



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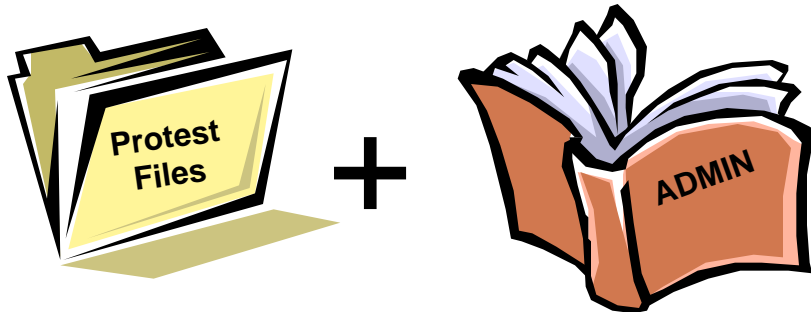
Protest files. **(33.104)** The FAR identifies documents that are a part of the protest file and separates those documents from other information in the administrative report to the GAO. The file shall be made available to non-intervening actual or prospective offerors within a reasonable time after submitting an agency report to the GAO. The protest file shall include:

- An index of all the documents.
- The protest.
- The offer of the protester and the offer being considered for award.
- protest.
- All relevant evaluation documents.
- Abstract of offers or the relevant portions.
- requested by the protester.

Protected information includes procurement sensitive information, trade secrets or other proprietary or confidential research and development or commercial information, basically the same information protected under the Freedom of Information Act. Have a redacted version of the protest available to other interested parties when the file contains sensitive material.

Administrative Report

- *C.O.'s statement of relevant facts*
- *Memorandum of law*
- *List of other parties receiving the report*
- *List of documents withheld and reasons*



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In addition to the protest file, the administrative report to the GAO includes:

- fact, actions taken, recommendations, and any additional evidence or information necessary to determine the protester's validity).
- A memorandum of law.
- List of other parties receiving a copy of the report.
- parties annotated to identify any specifically requested by the protester and reasons for withholding.

New GAO Bid Protest Regulation

Protest File Requirement Dropped
Undue burden
Forced to litigate



Federal Register 10 Aug., effective 1 Oct. 95

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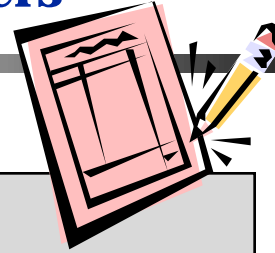
The General Accounting Office amended its bid protest regulations. The final rule was published in August and was effective October 1, 1995. It implements the FASA and conforms GAO's current regulation to the practice that has evolved since the last revision in 1991.

The GAO received numerous comments on their implementation of the protest file requirement in FASA. Requiring an agency to present a protest file within 20 days of a request for every protest before the GAO would represent an undue burden. Redacting the documents compounds the problem. The commentators pointed out that many protests are dismissed or withdrawn within the first 20 days after filing. In those cases, the time and effort devoted to preparing a protest file would be wasted. Commentors stated they would be forced to litigate every protest, even where summary dismissal is appropriate, because they would be compelled to devote their limited resources to prepare a protest file rather than to draft requests for summary dismissal.

In view of the concern that the requirement for early preparation of protest material is unduly burdensome, the GAO elected not to implement a protest file requirement as part of its bid protest procedures.

The agencies have a statutory obligation to implement a protest file procedure.

Protective Orders



Issued by GAO

Establishes restrictions for providing documents to “interested parties”

Restrict disclosure of procurement sensitive information

Cannot withhold from Congress

Protester must prepare “redacted” protest

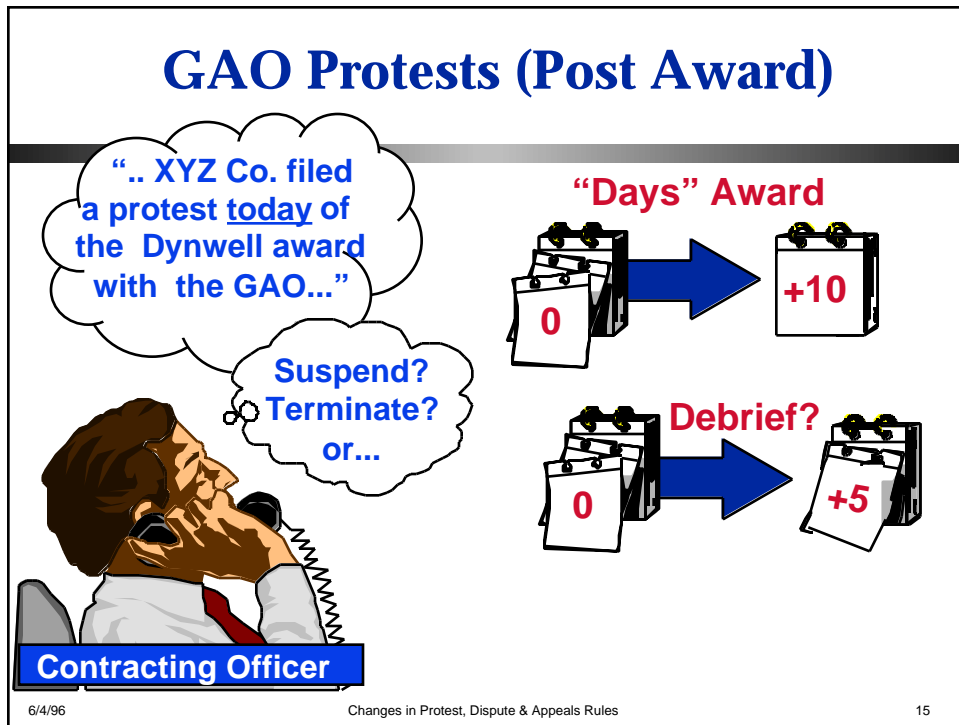
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Protective orders. **(33.104a (5))** The GAO may issue protective orders which establish terms, conditions and restrictions on the disclosure of information related to a protest. Protective orders prohibit or restrict the disclosure of procurement sensitive information, trade secrets or other proprietary or confidential research, development or commercial information that is contained in such a document. Basically, this is the same information protected under the Freedom of Information Act. Protective orders do not authorize withholding any documents or information from the Congress or an executive agency such as the Small Business Administration. The policies are new to the FAR but are not really different in substance from prior practice.

(33.104 a(2)) If a protester identifies sensitive information and requests a protective order, then the CO will obtain a redacted version from the protester to furnish to other interested parties. The protester must also prepare and furnish a redacted version to GAO.

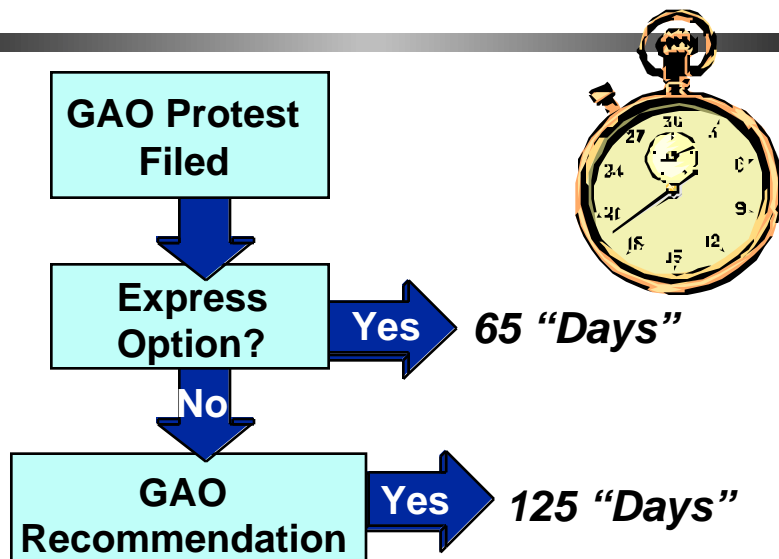


Post award protests. **(33.104 c (1)(5))** The contracting officer must suspend performance or terminate the contract when notice of protest is received from GAO within 10 days of award or five days after a debriefing date offered the protester for any debriefing required under Part 15, whichever is later. When the agency receives notice of a protest filed with the GAO after these dates, the contracting officer need not suspend performance or terminate the awarded contract unless the contracting officer believes that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Government's interest.

(33.104 c(2)) In accordance with agency procedures, the Head of Contracting Activity may authorize contract performance notwithstanding the protest upon a written determination that:

- States.
- interests of the United States will not permit waiting for the GAO's decision. This rule has not changed.

GAO Decision Time



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(33.104(f)) GAO issues its recommendation on a protest within 125 days from the date of filing the protest with the GAO or within 65 days under the express option.

GAO has the same amount of time to issue a decision generally notwithstanding the switch from work days to calendar days but can take more time to issue a decision under the express option.

If an amended protest cannot be resolved within the initial time limit, the GAO may resolve the amended protest through the express option.

Complete Corrective Action

**Implement Action of
GAO Decision within
60 Days of Receipt**



August						
S	M	T	W	T	F	S
1	2	3	4	5		
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

September						
S	M	T	W	T	F	S
				1	2	
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

**HCA Must Report
Failure within 5 Days**

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Complete corrective action. **(33.104(g))** If the agency has not fully implemented the GAO recommendations with respect to a solicitation for a contract or an award within 60 days of receiving the GAO recommendations, the HCA responsible for that contract shall report the failure to the GAO not later than five days after the 60 day period. In the past, the HCA had to file a report with the GAO within 60 days of receipt of the recommendations if the HCA decided not to comply with the recommendation. Now, the report must be filed even if the HCA has accepted the recommendations but not yet fully implemented them which is likely to be the case for such recommendations as recompeting the contract.. The report shall explain the reasons why the GAO's recommendation, exclusive of costs, has not been followed by the agency.

Award of Costs

Agency & protester
Negotiate Agreement
GAO Recommended
Amount
Consult Legal
Counsel before
paying Failure to Pay



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(33.104(h)) If the GAO determines that a solicitation does not comply with a statute or regulation, the GAO may recommend that an agency pay the cost, exclusive of profit, of filing and pursuing the protest, including reasonable attorney, consultant, and expert witness fees, and bid and proposal preparation costs.

If the GAO recommends the award of costs, the agency shall try to reach agreement on the amount to be paid. **(4CFR 21.8(f)(1))** The protester shall file its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 90 days after receipt of GAO's recommendation that the agency pay the protester its costs. Failure to file the claim within that time may result in forfeiture of the protester's right to recover its costs. (August 10, Federal Register, page 40743) If they are unable to agree, the GAO may upon request, recommend the amount of cost to be paid by the agency.

Before paying a recommended award of costs, agency personnel should consult legal counsel.

If GAO recommends the agency pay costs and the agency does not promptly pay, the agency shall report to GAO the reasons for the failure to follow the recommendation.

Attorney, Consultant & Expert Witness Fees



***Fees not in excess of Top GS-15 Pay
Attorney Fees Capped***

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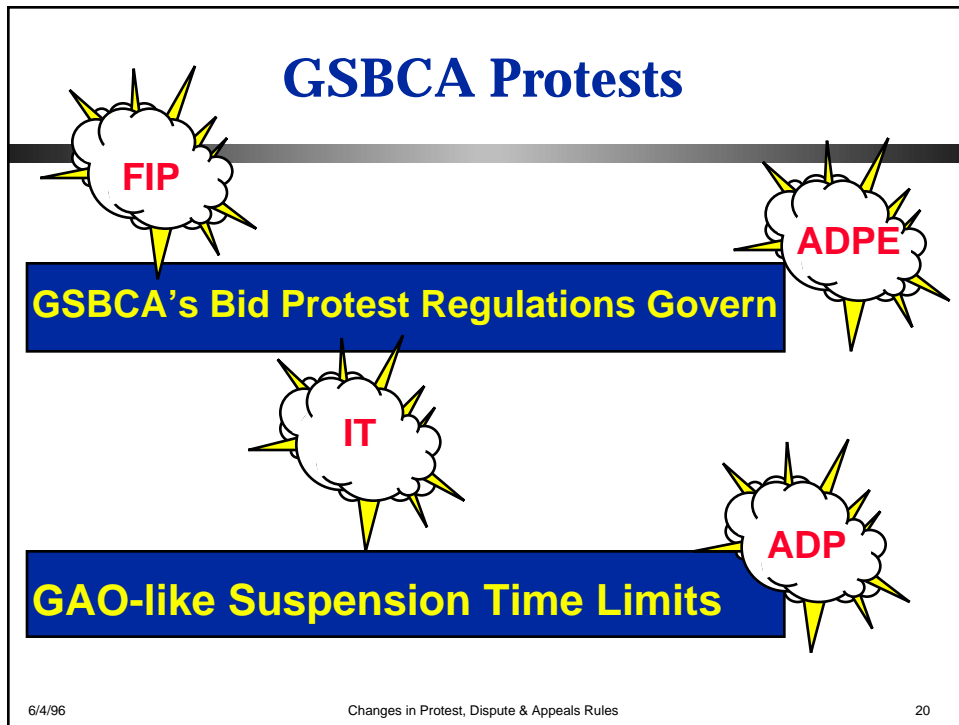
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(33.104(h)(3))

No agency shall pay a party costs recommended by the GAO:

- compensation paid by the Government (**5 CFR 304.105**). Unless specifically authorized by an appropriation or other statute, agencies may not pay for any one day an amount that exceeds the daily rate for GS-15, step 10, under the General Schedule.
- determines, (based on the recommendation of the Comptroller General on a case-by-case basis), that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorney's fees for businesses constitutes a benchmark as to what is a reasonable level for small businesses.




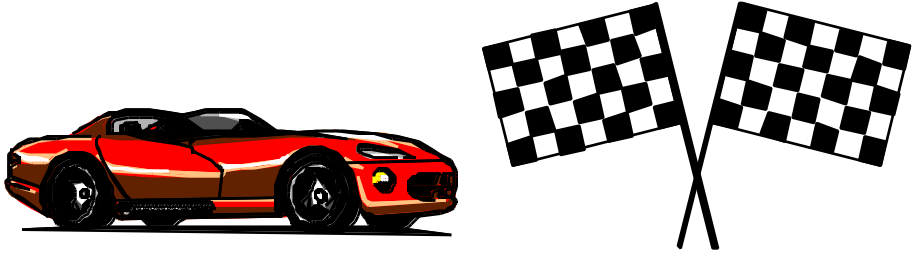
General Services BCA. **(33.105)** Prior to the Contract Disputes Act of 1978, some protests were heard by the Boards of Contract Appeals. The Contracts Disputes Act ended any authority for them to hear protests. However, the GSBICA retained jurisdiction to hear protests of Federal Information Processing - or FIP formerly referred to as ADPE resources - procurements under the Brooks Act.

In a recent statement on the Information Technology Management Reform Act of 1995 before the Senate Committee on Government Affairs, Mrs. Colleen Preston (DUSD (AR)) said, "... The GSBICA bid protest process weighs in favor of repeal of the Brooks Act." The repeal of the Brooks Act may be part of Title IV Streamlining in the Federal Acquisition Reform Act.

Suspension of Procurement Authority

Agency may Continue to Process to the Point of Award





Finish Line - Contract Award!

Settlements entered into the Public Record

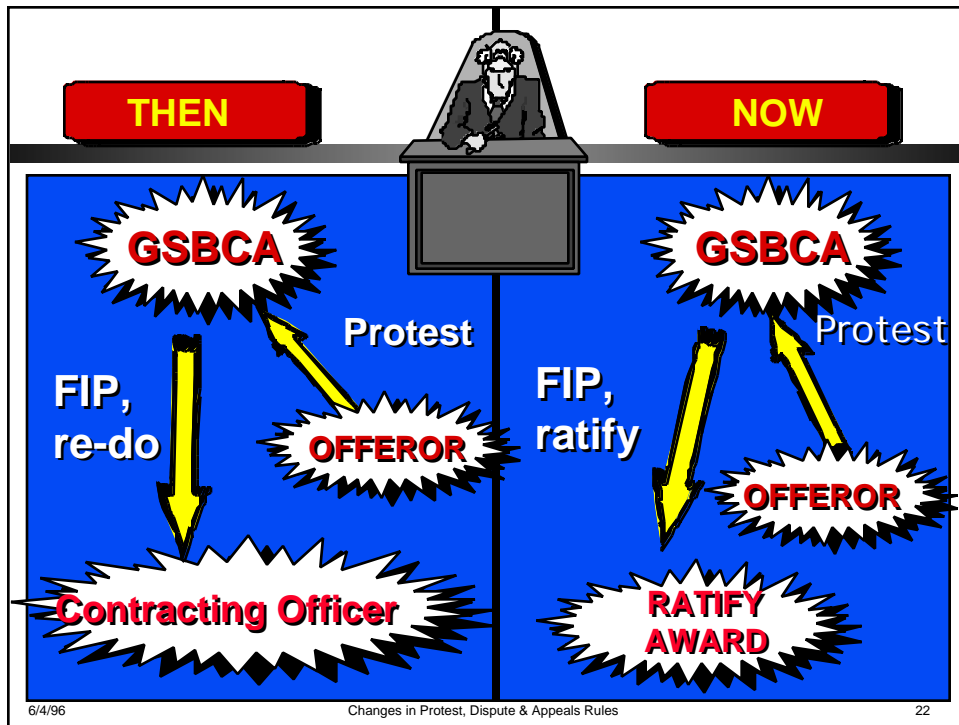
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(33.105d(1)(4)) If a protest contains a timely request for a suspension of procurement authority, the Board will hold a hearing unless the agency does not contest an order suspending its procurement authority. A timely request is one that is filed before award, within 10 days of award, or within five days of the offered debriefing, whichever applies. The Board suspends the procurement authority unless the agency establishes that: (1) contract award is likely within 30 days; (2) urgent & compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision.

At present, GSBCA can direct a procurement suspended in its entirety. The FAR now allows an agency, notwithstanding suspension, to continue the procurement process up to but not including award of the contract unless the Board determines such action is not in the United States' best interests.

When the Government and the protester reach a settlement involving the expenditure of appropriated funds, it must be entered into the public record before dismissal. The agency must provide a copy of the agreement and a memo signed by the CO detailing the: (1) procurement; (2) grounds for protest; (3) government position regarding the grounds for protest; (4) terms of settlement; (5) agency's position regarding the propriety of the award of the contract at issue.

Service of protest. **(52.233-2)** COs must be skilled at distinguishing requirements for Federal Information Processing resources for which the GSBCA is the proper protesting forum. (Offerors may protest the CO's classification of a requirement as being a non-FIPs requirement. But this protest must be lodged before the closing date for submitting proposals. Afterwards, the protest might not be considered timely and dismissed.)



This graphic depicts the old GSBICA protest process and the new rule regarding DPAs.

Delegation of procurement authority. **(39.002)** is an act where the authority to procure supplies and services is passed to another. In this case, the General Services Administration delegates authority to agencies to procure Federal Information Processing (FIP) resources. An amendment to the FIRMR allows authorized officials to issue after-the-fact DPAs covering a requirement that an agency initially thought wasn't FIP resources until informed otherwise by the GSBICA in response to a protest. With such a DPA in hand, contracting activities can ratify originally executed contracts. The new language means pre-award procurement actions will not have to be redone.

This solves the problem arising from the fact that protests to the GSBICA have resulted in decisions that requirements really were for FIP resources even though the agency originally thought otherwise. Having made such a decision, the procurement would then be entirely overturned because it had proceeded without a proper DPA in hand.

GSBCA Award of Costs

**Cost Exclusive of
Profit
Attorney, Consultant
Expert Witness Fees**



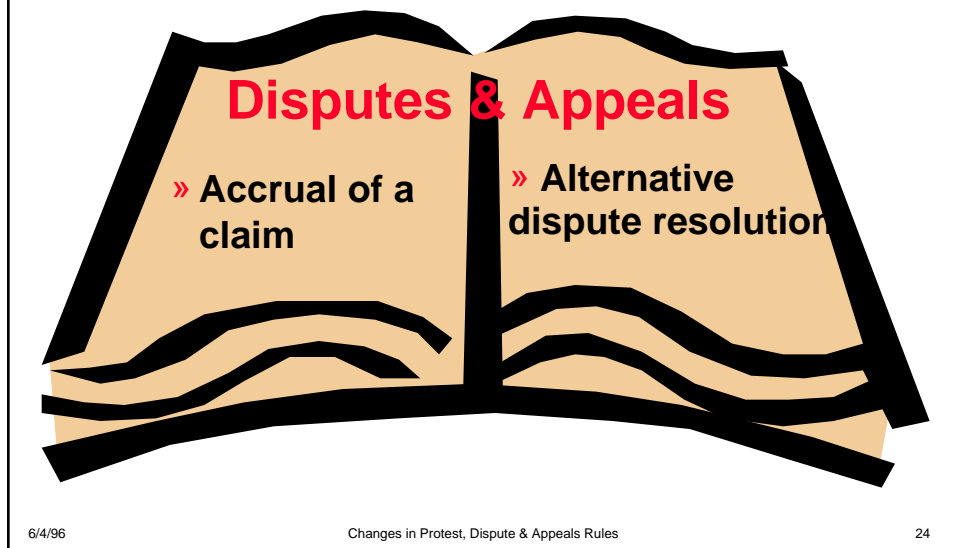
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The GSBCA may declare the prevailing party to be entitled to the cost, exclusive of profit, of filing and pursuing the protest, including reasonable attorney, consultant and expert witness fees, and bid and proposal preparation.

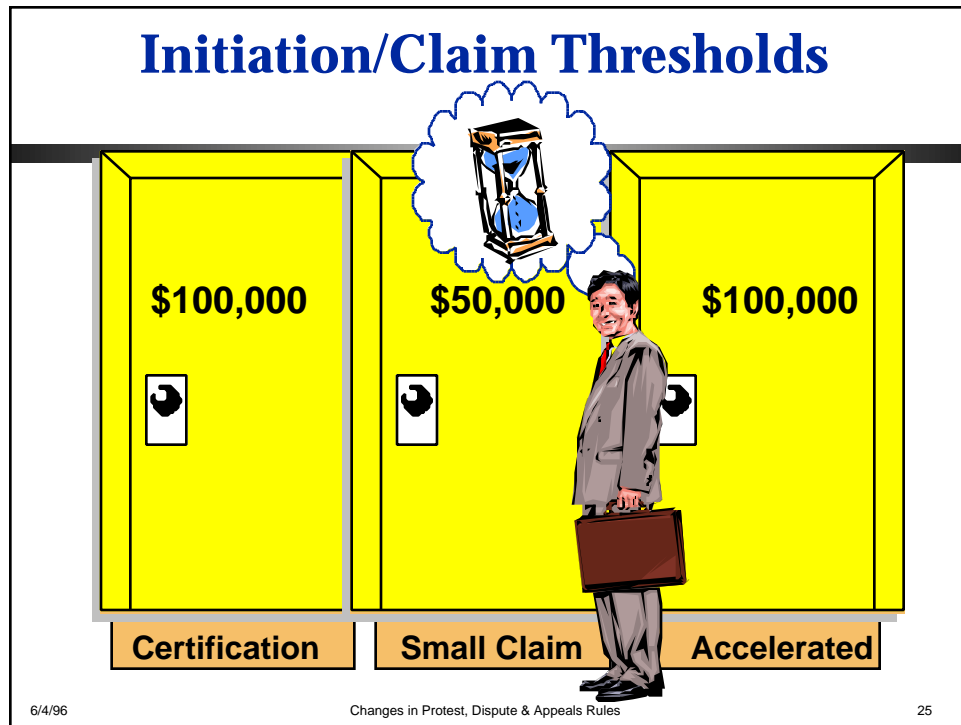
Definitions



Accrual of a claim occurs on the date when all events which fix liability of either the Government or the contractor and permit the assertion of the claim were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred. So, accrual is really a point in time.

In this definition, the FASA team included a “known or should have known” standard for discovery. Many defective pricing cases, for example, have their original events at the beginning of the contract or on contract award, but often they are not discovered by the Government until years later.

ADR refers to any procedure or combination of procedures voluntarily used to resolve issues in controversy without the need to resort to litigation. The definition is little changed from the former definition.



Initiation of claims and new thresholds. **(33.206(a))** Contractor claims shall be submitted in writing to the contracting officer for a decision within six years after accrual of a claim, unless the contracting parties agree to a shorter time period. This six year period does not apply to contracts awarded prior to October 1, 1995. The contracting officer shall document the contracting file with evidence of the date of receipt of any submission from the contractor deemed to be a claim.

The contracting officer shall render a written decision on any government claim initiated against a contractor within six years after accrual of the claim. This six years period does not apply to a government claim based on a contractor claim involving fraud.

(33.207(a)) Contractors will certify any claim exceeding the Simplified Acquisition Threshold (currently \$100,000). The certification covers the accuracy and completeness of the data upon which the claim is based.

The small claims threshold was increased from \$10,000 to \$50,000, and the threshold for accelerated procedures was increased from \$50,000 to \$100,000.

Alternative Dispute Resolution

Assisted Settlement Negotiations

Mediation

Fact Finding

Arbitration

Mini-Trials

Facilitation

Conciliator



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ADR procedures may include but are not limited to the those shown on the chart.

(33.214) If the CO rejects a small business contractor's request for ADR, the CO must provide a written explanation citing one or more of the conditions in five USC. Where a contractor rejects the request of an agency for ADR, the contractor shall inform the agency in writing of the specific reasons for rejecting the request.

(5 USC 572(B)) Don't use alternative dispute resolution if:

- A precedential resolution is required.
- additional procedures before final resolution.
- Maintaining established policies is of special importance.
- parties to the proceeding.
- Full public record is important.
- authority to alter the disposition in the light of changed circumstances.

This concludes the briefing on protests and disputes. What are your questions?

Changes in Protest, Dispute & Appeal Rules - Practical Exercise

Practical Exercise will last for 1 and 1/2 hours.

The Practical Exercise focuses on new rules, definitions and changes in protest procedures.



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The objective of the practical exercise is to correctly apply the rule, procedures and definitions covered in the lecture.

The exercise will take approximately 1-1/2 hours. I suggest you work through each scenario sequentially, first individually and then to achieve group consensus. Break out the time as follows:

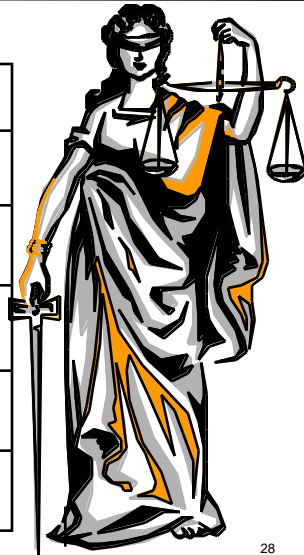
Scenario 1	20 minutes
Scenario 2	30 minutes
Scenario 3	40 minutes

Scenario 1 is a short case study concerning recovery of protest costs. Your solution may be written in the space provided in the exercise.

Changes in Protest, Dispute & Appeal Rules - Practical Exercise

Attachment 2 - GSBICA Protests

	Timely? Y/N	Suspend? Y/N	Validity? (Y/N - Why?)	Remarks
1				
2				
3				
4				
5				



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This is the answer template for Scenario 2.

Scenario 2 covers the new rules in GSBICA protests. You assume the role of GSBICA lawyer determining timeliness, whether to suspend an agency's procurement authority and whether the agency's requests not to suspend are valid.

Changes in Protest, Dispute & Appeal Rules - Practical Exercise

ATTACHMENT 3 AGENCY PROTESTS MATRIX

CASE # (Stack A)	TIMELY Y/N	STAY AWARD Y/N	SUSPEND/ TERMINATE	REMARKS
1				
2				
3				
4				
(Stack B)	DEMAND REPAYMENT Y/N	MEANS TO RECOVER	OTHER ACTIONS	
5				
6				
7				



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This is the answer template for Scenario 3.

Scenario 3 deals with agency protests in two parts. In part A you will make determinations of timeliness. Additionally you must decide whether to stay award (pre-award) or suspend/ terminate performance (post-award). Briefly justify your response in the remarks block.

In the second part, you will make decision about recovering protest costs. Determine whether the correct course of action is to demand repayment and then how to do it. Remember, the protest must be sustained by the GAO before the Government may seek to recover protest costs. What costs will you attempt to recover? What other actions would you take?